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Supreme Court of the United States

OCTOBER TERM, 1938

No. [redacted] 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 913.

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

STATEMENT OF THE CASE

The only relevant fact in this case is that respondent is a Delaware corporation, and raised timely objection under §51 of the Judicial Code (28 U. S. C. 112) to the venue of a suit brought against it by New Jersey citizens and residents in the Southern District of New York solely on the ground of diversity of citizenship.[1]

[1] The statement of this Court, in *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, at page 211, with respect to a suit in the New Jersey federal court, affords a model of brevity for a description of this case, as follows: "The plaintiff was a

The petitioners' statement of facts places emphasis upon the fact that the respondent is alleged to have property within the jurisdictional limits of the Southern District of New York. This would be irrelevant, if true. However, the record citations given by petitioners (all from their own bill of complaint) do not support the statement. See page 3 of their petition, at which there are references to R. 16 and R. 32 (at which we find only allegations relating to New York Harbor, which embraces both the Southern and Eastern Districts of New York[2]), R. 35 and R. 36 (at which we find no allegations even relating to the subject), and R. 43 (at which we find a reference to Staten Island, a part of the Eastern District of New York[2]). The facts are that the respondent had no plants in the Southern District of New York when this suit was commenced against it, although it did have plants in the Eastern District (Kings and Richmond Counties) and in other States, but that it had some office furniture in the Southern District of New York. Petitioners also refer to an affidavit made by their own attorney, entirely on information and belief, to the effect that respondent's principal office is in the Southern District of New York; but we did not answer this affidavit, as the point seemed irrelevant in view of the clear statutory mandate in §51 which confines venue to the residence of either the plaintiff or the defendant.

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citizen of New York; the defendant a Delaware corporation; the federal jurisdiction rested wholly on diversity of citizenship; and neither party was a citizen of New Jersey. Thus, there was a sound objection to the venue." If the words "New York" and "New Jersey" are transposed, and the reference to the plaintiff is made plural, the foregoing quotation precisely describes the case at bar.

[2]Judicial Code, § 97, 28 U. S. C. 178.

PETITIONERS' STATEMENT OF "QUESTIONS PRESENTED"

1. The question numbered "1" in the petition is in effect two questions, separated by the "and thereby" phrase. The first question,—whether "the local courts" will take jurisdiction of an action under certain circumstances,—is a question of local law, not of Federal law, and does not relate to the venue of suits in the Federal courts. As stated by the petitioners, it can obviously be answered "yes", without in any way affecting the question of Federal law presented after the "and thereby" phrase. In other words, the "question" preceding the "and thereby" phrase is unwarranted. The "question" following that phrase, if answered at all, must be answered in the negative. Submission by a foreign corporation to state court jurisdiction over its person, through qualifying to do business and designating an agent for the service of process, cannot constitute the waiver of a privilege explicitly accorded by Federal statutes to decline to be sued by non-residents in a United States court.

2. The facts do not justify the second question. It *assumes* that the respondent's "main business headquarters, its registered office, its designated agent and a substantial part of its properties are located" in the Southern District of New York. In fact, none of the defendant's properties, except office furniture, are located in the Southern District of New York. Also, there is no evidence, except an affidavit made on information and belief by petitioners' attorney, that the respondent's "main business headquarters" is in the Southern District of New York.

However, no substantial question would be presented even if the facts were correctly stated, for the reason that §51 of the Judicial Code in terms makes the test of venue dependent upon the state of residence and not upon facts of the character relied upon by the petitioners.

PETITIONERS' STATEMENT OF "REASONS RELIED ON FOR ALLOWANCE OF WRIT"

We refer to the petitioners' reasons in order:

(1) The decision below is not in conflict with that of the Tenth Circuit Court of Appeals in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 100 F. (2d) 770 (1938), as the court there was careful to state that it was placing its decision on a special ground, *viz.*, its construction of certain Oklahoma statutes. Of course, we agree with the Second Circuit Court of Appeals that the distinction asserted by the Tenth Circuit Court of Appeals is unsound (R. 93); but we also agree with the Second Circuit Court of Appeals that the Tenth Circuit Court of Appeals believed that it was "recognizing the general rule" that "a mere designation of an agent to accept process is not a waiver of the venue privilege" afforded to foreign corporations by §51 of the Judicial Code, which was affirmed by this Court in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207-208.[3] We do not see that the language of the

[3] The cases in accord in the lower federal courts include: *McLean* v. *State of Mississippi*, 96 F. (2d) 741, cert. den. —— U. S. ——, 59 Sup. Ct. 84, 83 L. Ed. 20; *Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 7th, 1926); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed.

Tenth Circuit Court of Appeals in 100 F. (2d) at page 774, can be read in any other way. Accordingly, the grant by this Court of the writ of certiorari in the *Oklahoma Packing* case does not call for a like grant in the present case, as the two Circuit Courts of Appeals are agreed on the fundamental principle, and the only question relating to venue which was properly presented in the petition for a writ of certiorari in that case was whether the Tenth Circuit Court of Appeals was correct in thinking that it had found a distinction specially applicable on the facts of that case.

2. The petitioners misconceive the holding of *Ex parte Schollenberger*, 96 U. S. 369. It was there held that foreign corporations which had designated an agent in Pennsylvania for the service of process against them were "found" in Pennsylvania, and could, therefore, be sued in that state under the then existing venue statute,[4] which established two alternative tests for venue, *viz.*, "residence" or being "found". When that statute was repealed in 1887, and the test of "residence" was established as the sole

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271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *The George W. Borg Co.*, N. D. Ill. E. D., Mar. 16, 1939, Wilkerson, D.J. (Dept. of Justice, Decisions on Federal Rules of Civil Procedure, Bull. No. 23, p. 5, Apr. 3, 1939); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penn., 1910); *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900).

[4]Act of March 3, 1875, c. 137, 18 Stat. at L. 470.

test,[5] the *Schollenberger* decision became wholly inapplicable, as this Court held in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207-208.[6]

The other cases cited by petitioners relate to an entirely different matter—whether personal jurisdiction of a foreign corporation is acquired by service on a designated agent in a suit on a claim arising outside the state. Whether the authority conferred by the designation is sufficiently broad in scope to extend to such a case may depend upon the law of the state; but whether the designation has the effect of waiving, for all time, the venue privilege expressly afforded by §51 of the Judicial Code, is a question on which there can obviously be no "state law", since the question can never arise in a state court action. The effect of such a designation must be, and has been, determined by the federal courts.[7]

3. The court below decided a question as to the venue of a suit in the District Court for the Southern District of New York. A decision on such a question *could not be* in

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[5]Act of March 3, 1887, c. 373, sec. 1, 24 Stat. at L. 552, as corrected by Act of August 13, 1888, c. 866, sec. 1, 25 Stat. at L. 433.

[6]This Court has recognized the intent of Congress in 1887 to restrict the jurisdiction of the federal courts by eliminating the "finding" of the defendant as one of the tests of venue (*Smith* v. *Lyons*, 133 U. S. 315, 319; *Galveston &c. Railway* v. *Gonzales*, 151 U. S. 496, 499; *Camp* v. *Gress*, 250 U. S. 308, 312); but the petitioners argue that now, 52 years later, that intent of Congress should be held abortive, in so far as foreign corporations are concerned.

[7]*Southern Pacific Co.* v. *Denton*, 146 U. S. 202, and the cases cited in footnote 3, *supra*.

conflict with any decision of a state court. Thus, the New York Court of Appeals in *Bagdon* v. *Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432 (1916) only decided that service on a designated agent conferred on the state court jurisdiction to render a judgment *in personam* against a foreign corporation on a claim arising in another state. It held, with reference to the "contract" by which the agent was designated, that "The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person" (217 N. Y. at p. 437). The case at bar involves neither jurisdiction of the subject-matter nor jurisdiction of the person—both of which admittedly exist here. The court below has held that the absence of a third requisite for an action in the District Court—proper venue under Judicial Code §51—presents an effective bar to the maintenance of this suit against the respondent.

4. In so far as the court below held that respondent could acquire no residence, within the meaning of Judicial Code §51, outside of the state of its incorporation (which was conceded by petitioners in the District Court), its decision may be contrary to one of the two grounds for the decision in *Dodge Mfg. Co.* v. *Patten*, 60 F. (2d) 676 (C. C. A. 7th, 1932). However, the "conflict" is not one which should lead to the granting of the writ, for two reasons:

(a) Since the *Dodge* decision, this Court has reaffirmed, in *International Milling Co.* v. *Columbia Co.*, 292

U. S. 511, 519,[8] the holding in numerous prior cases,[9] which the Seventh Circuit Court of Appeals failed to mention,[10] that a corporation has its residence in the state of its

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[8]The relevant statement from the opinion is quoted on page 14 of the petitioners' brief.

[9]*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *In re Keasbey and Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363. See also *Ex parte Schollenberger*, 96 U. S. 369, 377; *Male* v. *Atchison &c. Ry.*, 240 U. S. 97; *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 271; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211. Other cases in accord include: *Yanuszauckas* v. *Mallory S. S. Co.*, 232 Fed. 132 (C. C. A. 2d, 1916); *McLean* v. *State of Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938), cert. den. —— U. S. ——, 59 Sup. Ct. 84, 83 L. Ed. 20; *Central West Public Service Co.* v. *Craig*, 70 F. (2d) 427 (C. C. A. 8th, 1934); *De Dood* v. *Pullman Co.*, 53 F. (2d) 95 (E. D. N. Y., 1931), aff'd 57 F. (2d) 171 (C. C. A. 2d, 1932); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penna., 1910). See also: *Hazeltine Corporation* v. *White*, 68 F. (2d) 715, 716 (C. C. A. 2d, 1934); *Automotive Equipment, Inc.* v. *Trico Products Corporation*, 10 Fed. Supp. 736, 738 (S. D. N. Y., 1935); *Brehm* v. *Delaware & H. R. Corporation*, 1 Fed. Supp. 217, 218 (S. D. N. Y., 1931); and *Fruit Industries, Ltd.* v. *Metro Glass Bottle Co.*, 18 Fed. Supp. 489, 492-493 (N. J., 1937).

[10]As the court below pointed out (R. 89), the opinion in the *Dodge* case was based upon a decision of Mr. Justice Harlan on circuit in *U. S.* v. *Southern Pacific R. R. Co.*, 49 Fed. 297 (N. D. Cal., 1892), but the Seventh Circuit Court of Appeals failed to note the later contrary decisions of this Court (footnote 9, *supra*), in several of which Mr. Justice

incorporation and in no other state, within the meaning of Judicial Code §51. Therefore, the "conflict" has already been resolved by this Court.

(b) The *Dodge* decision on the "residence" question has not been followed in any other circuit since its pronouncement almost seven years ago, although numerous cases have involved the same question (see footnote 9, *supra*); and recently a District Court in the same circuit has expressly refused to follow it. *Hamilton Watch Co.* v. *The George W. Borg Co.*, N. D. Ill. E. D., Mar. 16, 1939, Wilkerson, D.J. (Dept. of Justice, Decisions on Federal Rules of Civil Procedure, Bull. No. 23, p. 5, Apr. 3, 1939). Because the departure in the language of the *Dodge* opinion from the rule established by this Court is so apparent, that decision has not resulted in any confusion in the lower federal courts, and there is no need for this Court to again affirm the obvious proposition already so clearly established by its prior decisions.[11]

Harlan dissented (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 511. *Cf. Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357).

[11]Explanation of the result reached in the *Dodge* case may perhaps be found in the fact that there had been a trial at which the defendant had established a right to a decision on the merits. Accordingly, no one but the plaintiff would have benefited from belated recognition of the defendant's venue objection. Since the defendant could have waived the objection, and undoubtedly would have waived it had it been apprised of the court's decision on the merits, the court naturally sought to avoid giving the plaintiff another bite at the apple as a result of the initial error in overruling the defendant's venue objection made in advance of trial (*Patten* v. *Dodge Mfg. Co.*, 23 F. (2d) 852 (D. C. Ind., 1928)).

5. The "residence" and "waiver" questions presented in this case were undoubtedly important at an earlier day, but they have long since been settled by decisions of this Court. The decisions on the "residence" question are collected in footnote 9, *supra*. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, completely disposes of the "waiver" question. With reference to an argument identical with that now made by petitioners, that the designation of an agent by a foreign corporation is a waiver of all future venue objections under Judicial Code §51, this Court said (at pp. 207-208):

> "* * * the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. *Lafayette Ins. Co.* v. *French*, 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State —so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369; *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138; *In re Louisville Underwriters*, 134 U. S. 488. But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class

of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States."

Although there were two *alternative* reasons stated for that decision, the first of which is inapplicable to the present case, we agree with the statement of the Fifth Circuit Court of Appeals in *McLean* v. *State of Mississippi*, 96 F. (2d) 741, certiorari denied October 10, 1938, — U. S. —, 59 Sup. Ct. 84, 83 L. Ed. 20, that "we must consider the second reason, deliberately expounded with citation of authority, as the judgment of the Supreme Court that under the present federal statute appointment of an agent for service under a State statute so requiring does not imply an agreement to waive venue privileges in the courts of the United States."

CONCLUSION

A writ of certiorari should not be granted in this case.

Respectfully submitted,

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